



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

MAR 14 2006

Dalton Tanonaka
Tanonaka for Congress

Honolulu, HI 96805

RE: MUR 5571

Dear Mr. Tanonaka:

On October 24, 2004, the Federal Election Commission notified you individually, as well as Tanonaka for Congress and Dalton Tanonaka, in his official capacity as treasurer, ("TFC"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to both you and TFC at that time.

Upon further review of the allegations contained in the complaint, and information supplied by you, the Commission, on March 7, 2006, found that there is reason to believe you knowingly and willfully violated 2 U.S.C. §§ 441a(f) and 441b(a), provisions of the Act. The Commission also found that there is reason to believe that TFC knowingly and willfully violated 2 U.S.C. §§ 434(b), 441a(f) and 441b(a), provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's findings, is attached for your information.

You and TFC may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you and TFC are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

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Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

If you and TFC intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed forms stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Marianne Abely, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,


Michael E. Toner
Chairman

Enclosures

Factual and Legal Analysis

Designation of Counsel Forms

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1 **FEDERAL ELECTION COMMISSION**
2 **FACTUAL AND LEGAL ANALYSIS**

3
4 MUR 5571

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6 RESPONDENTS: Dalton Tanonaka, Tanonaka for Congress
7 and Dalton Tanonaka, in his official capacity as treasurer
8

9 **I. INTRODUCTION**

10
11 This matter was generated by a complaint filed with the Federal Election Commission by
12 James J. Bonham, on behalf of the Democratic Congressional Campaign Committee. *See*
13 2 U.S.C. § 437g(a)(1). At issue is whether Dalton Tanonaka used personal funds to make three
14 loans to his 2004 congressional campaign or whether he made those loans using excessive and/or
15 prohibited contributions. The complaint focuses on two loans totaling \$69,000 Tanonaka made
16 to Tanonaka for Congress ("TFC") in the summer of 2004. Tanonaka made a third loan, of
17 \$11,000, to TFC in October 2004. Federal prosecutors in Hawaii investigated this loan,
18 concluding that the loan came not from Tanonaka's personal funds but instead from a \$25,000
19 loan he had obtained from a family member. Tanonaka pled guilty to a misdemeanor of
20 accepting a federal contribution that exceeded the \$2,000 limit.¹ Ken Kobayashi, *Tanonaka*
21 *Admits Breaking the Law*, HONOLULU ADVERTISER, July 22, 2005 (hereinafter July 22, 2005
22 HONOLULU ADVERTISER article).

¹ Tanonaka also pled guilty to three felony charges related to his disguising the true sources of loans he reported making from personal funds to his 2002 campaign for Lieutenant Governor of Hawaii, and an additional misdemeanor charge of failing to disclose on his U. S. House of Representatives Financial Disclosure Statement a consulting position with the Koa Companies. Ken Kobayashi, *Tanonaka Admits Breaking the Law*, HONOLULU ADVERTISER, July 22, 2005. The Koa Companies, as discussed *infra* pp. 3-4, are apparently the source of the funds Tanonaka used to make the \$65,000 in loans that the complaint here alleges were illegal. Tanonaka committed federal crimes connected to the loans for his unsuccessful 2002 state campaign when, having already concealed the true sources of those funds from state authorities, he hid his personal obligation to repay the true sources when he applied for bank loans for personal purposes the following year. Curtis Lum, *Tanonaka Sentenced to 3 Months in Prison*, HONOLULU ADVERTISER, Nov. 4, 2005. Hawaii's Campaign Spending Commission ("CSC") fined Tanonaka \$7,500 for failing to report as contributions the 2002 funds he used to make loans to his state campaign committee. *Tanonaka Assessed a \$7,500 Penalty*, HONOLULU ADVERTISER, Nov. 11, 2005.

1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Background**

3 In June 2004, Dalton Tanonaka, a former newspaper reporter and television anchor for
4 CNN International and CNBC Asia, announced that he was running for Congress in Hawaii's 1st
5 Congressional District.² Two years prior, Tanonaka had run unsuccessfully for Lieutenant
6 Governor of Hawaii. *Republican Tanonaka Seeks to Challenge Abercrombie*, HONOLULU
7 ADVERTISER, June 3, 2004.

8 On July 21, 2004, Tanonaka loaned \$4,000 to his campaign, and on August 28, 2004, he
9 loaned an additional \$65,000 to the campaign. Both loans were reported as coming from the
10 candidate's personal funds. *See* 2004 Pre-primary Report (7/1/04 – 8/29/04). The complaint
11 alleges that Tanonaka did not have sufficient personal income or assets to make these two loans,
12 and therefore must have obtained the funds from unknown persons or entities. The United States
13 House of Representatives Financial Disclosure Statement ("Financial Disclosure Statement")
14 that Tanonaka filed on July 19, 2004 appears to substantiate this claim. *See* Complaint,
15 Attachment A. This Financial Disclosure Statement, which covers the period January 1, 2003,
16 through July 19, 2004, lists a salary of \$4,762.22, identifies no unearned income over \$200 or
17 reportable assets worth more than \$1,000, and reports significant personal debts. *Id.*

18 Tanonaka explains in his response to the complaint that these loans came from his
19 personal funds.³ He states that the \$4,000 he used to make the July 21, 2004 loan came from

² Tanonaka filed his Statement of Candidacy on June 9, 2004. He ran unopposed in the Republican primary, which was held on September 18, 2004.

³ The response includes an affidavit from former TFC treasurer Masuda. Masuda supports Tanonaka's explanation, but does not provide any specific factual information to bolster it. *See* Response, Affidavit of Michael Masuda at ¶¶ 4 and 5.

1 personal gifts he received for his birthday, which fell on June 13.⁴ Tanonaka claims that the
2 \$65,000 loan on August 28, 2004 came out of a \$70,000 lump-sum payment he received from a
3 longstanding consulting contract. He provided documents reflecting his deposit of a \$70,000
4 check into his personal checking account and issuance of a \$65,000 check to TFC. *See*
5 *Response*.

6 The consulting position Tanonaka referenced in the response was with four timber
7 harvesting and development companies (collectively, "the Koa Companies") operated by Kyle
8 Dong.⁵ *See also* Kristen Sawada and Prabha Natarajan, *Creditors Hammer Hilo Mill*, PACIFIC
9 BUSINESS NEWS, Aug. 24, 2001; Diana Leone, *2 Firms Fined \$149,000 for Illegal Big Isle*
10 *Logging*, STARBULLETIN.COM, Jan. 10, 2004. According to the consulting agreement, dated
11 April 25, 2003, in return for assistance in selling and marketing their Hawaiian timber product to
12 various individuals and entities around the world, the Koa Companies agreed to pay Tanonaka
13 \$10,000 monthly for the entire term of the five-year agreement as well as a 5% commission on
14 annual sales exceeding \$5 million. Apparently, the Koa Companies were experiencing financial
15 trouble during the relevant time period and were unable to pay Tanonaka according to the terms
16 of the consulting contract.⁶ In total, Tanonaka received only three payments from the Koa
17 Companies and Dong: a \$3,000 check from Incentive Design Builders, Inc. ("IDB") dated June

⁴ Tanonaka provides two documents about this transaction, but both simply memorialize that the campaign deposited \$4,000 into its bank account and classified it as a loan; neither support his claim about the source of the money.

⁵ Tanonaka attached to the response a heavily redacted copy of the consulting agreement. We obtained an unredacted copy of the subject consulting agreement from the CSC, which had obtained the document from public court filings. According to this document, the Koa Companies include Hawaii Forest Preservation LLC (a Hawaii limited liability company), and three Hawaii for profit corporations: KOA Timbers, Inc.; Incentive Design Builders, Inc.; and K&K Investments. Dong is the registered agent for all of these companies.

1 8, 2004; the \$70,000 check from IDB dated August 27, 2004 (out of which Tanonaka asserts he
2 made the \$65,000 loan to TFC); and a \$10,000 check from Dong, dated November 23, 2004.

3 Tanonaka's criminal plea agreement, dated July 21, 2005, provides details about the
4 \$11,000 loan he made to his campaign. According to the plea agreement, in October 2004
5 Tanonaka solicited \$25,000 from "BO" because it was "'crunch time' in the Congressional
6 election" and "he needed the money for personal and campaign expenses." From news reports, it
7 appears that "BO" refers to Tanonaka's brother-in-law Burt Okihara, who is married to
8 Tanonaka's sister, Sandra Okihara. July 22, 2005 HONOLULU ADVERTISER article. On October
9 8, 2004, "BO" purchased a \$25,000 cashier's check made payable to Tanonaka. That same day,
10 Tanonaka deposited the check into his personal checking account and then transferred \$11,000
11 from this account into TFC's bank account. Prior to these transactions, the balance in
12 Tanonaka's personal bank account was \$34.64 and the balance in TFC's bank account was
13 \$3,179.20. The true source of these funds was not reported to the Commission.

14 **B. Legal Analysis**

15 1. The Loan Made by Tanonaka to TFC on October 8, 2004

16 With respect to the October 2004 loan, Tanonaka admitted in his plea agreement that his
17 brother-in-law Burt Okihara (the "BO" described in the plea agreement) loaned him the money
18 and that he falsely reported the funds as coming from his personal funds.⁷ See Pre-General
19 Report (10/1/04 – 10/13/04). Therefore, Tanonaka and TFC accepted an excessive contribution

⁶ Much of the information relating to Tanonaka's consulting agreement with the Koa Companies referenced herein was derived from his criminal plea agreement with the Justice Department.

⁷ The Commission's regulations define "personal funds" to include salary and other earned income from *bona fide* employment and gifts of a personal nature that had been customarily received prior to candidacy.
(footnote continued on next page)

1 in violation of 2 U.S.C. § 441a(f), and TFC falsely reported the source of the loan in violation of
2 2 U.S.C. § 434(b).⁸

3 2. The Loans Made by Tanonaka to TFC during the Summer of 2004

4 According to the response, the \$4,000 that Tanonaka loaned to TFC on July 21, 2004
5 came from "personal gifts" he received for his birthday. Response at 1. Gifts received by a
6 candidate are considered his or personal funds provided they were "customarily received prior to

11 C.F.R. § 110.33. A candidate may make unlimited loans to his campaign from personal funds. 11 C.F.R. § 110.10.

When Tanonaka attempted to correct his 2004 12 Day Pre-General report in conjunction with his guilty plea, he stated that his sister, Sandra Okihara, loaned him the \$25,000. *See* Amended 2004 12 Day Pre-General Report (10/1/04 – 10/13/04) (etext attachment). According to the FEC database, Sandra Okihara had contributed \$1,000 to TFC on June 13, 2004, and another \$1,000 to the campaign on October 8, 2004. Tanonaka, as treasurer of TFC by this time, filed this amended report a little more than two weeks before the date of the criminal plea agreement in which he stated that "BO", *i.e.* Burt Okihara, loaned him the \$25,000. The Commission's analysis assumes that the plea agreement represents the most accurate account, given that Tanonaka faces the revocation of the agreement and substantially greater criminal penalties if he made false statements in the agreement.

Furthermore, although the plea agreement stipulates that Tanonaka solicited and accepted a contribution from "BO" that was excessive by \$9,000, given that Burt Okihara apparently made no contributions to Tanonaka's campaign, the actual amount of the excessive contribution may be as high as \$23,000. At the time of the transaction, Tanonaka's personal checking account was all but empty, and the plea agreement recites that Tanonaka needed funds for personal, as well as campaign, expenses. It is therefore likely that Tanonaka kept the remaining \$14,000 that he did not transfer to TFC to cover personal expenses. The Commission's personal use regulations provide that a third party's payment of a candidate's personal expenses during the campaign is a contribution unless the payment "would have been made irrespective of the candidacy," for example if the third party had made such payments before the candidacy. 11 C.F.R. § 113.1(g)(6)(iii). Absent evidence of such previous payments, the amounts used for Tanonaka's personal expenses would also represent an excessive contribution.

⁸ A contribution includes a gift or loan made by any person for the purpose of influencing a federal election. 2 U.S.C. § 431(8)(A)(i). In 2004, the Act prohibited contributions to any candidate and his or her authorized political committee with respect to any election for federal office that exceeded \$2,000. 2 U.S.C. §§ 441a(a)(1)(A). This contribution limit also applies to family members of a candidate. *Buckley v. Valeo*, 424 U.S. 1, 51 (1976). A candidate and political committee may not knowingly accept a contribution in violation of the provisions of the Act. 2 U.S.C. § 441a(f). Further, authorized political committees must report the identification of each person who makes a contribution in excess of \$200 per election cycle. 2 U.S.C. § 434(b)(3)(A).

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1 candidacy.”⁹ 11 C.F.R. § 110.33. Tanonaka does not identify the individual(s) or entities that
2 gave him the \$4,000, nor does he provide the exact date on which he received the funds,
3 although he notes that he received the funds and had them in his possession “from [his] birthday
4 party,” and that his birthday is June 13th. Response at 1. Perhaps more importantly, he provides
5 no information indicating whether the person(s) or entities that gave him the money customarily
6 gave him similar personal gifts prior to his candidacy. If these funds were not “gifts of a
7 personal nature,” then TFC may have violated 2 U.S.C. § 434(b) by reporting the \$4,000 as
8 coming from personal funds.¹⁰

9 In addition, the \$70,000 payment from IDB to Tanonaka may have been a prohibited
10 corporate contribution rather than a *bona fide* payment of compensation under the consulting
11 agreement.¹¹ Tanonaka received the \$70,000 in a lump sum, which was contrary to the terms of
12 the consulting agreement, and at a time when his campaign committee’s financial position was
13 poor. Within an hour of Tanonaka’s depositing the check from IDB into his personal account,
14 TFC deposited a \$65,000 check from Tanonaka into its account, which prior to that deposit had a
15 balance of \$1,955.46. Further, Tanonaka’s failure to disclose either his position as a consultant

⁹ The Commission has focused on objective factors in determining whether a gift fits into the category of “gifts of a personal nature customarily received prior to candidacy.” Specifically, the Commission tends to look at the date the gifts began, the consistency in the amount, and the form of the gifts over a number of years. *See* AO 1988-7.

¹⁰ Moreover, depending on the source or sources of these funds, TFC and Tanonaka may have accepted excessive or prohibited contributions in violation of 2 U.S.C. §§ 441a(f) or 441b(a).

¹¹ The Act prohibits a corporation from making any contribution in connection with a Federal election and prohibits any officer or director from consenting to such a contribution. 2 U.S.C. § 441b(a). Commission regulations recognize that an individual may pursue gainful employment while a candidate for federal office. 11 C.F.R. § 100.33(b)(1) (earned income from *bona fide* employment included in “personal funds” of a candidate). *See also* 11 C.F.R. § 113.1(g)(6)(iii) (third party payments for candidate’s personal expenses during the campaign is a contribution unless, *e.g.*, it is employment compensation exclusively in consideration of services provided as part of this employment; and the compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same period of time).

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1 with the Koa Companies or the \$3,000 income from IDB on his Financial Disclosure Statement
2 indicates a desire to conceal that relationship.¹² In fact, Tanonaka did not acknowledge a
3 business relationship with Dong and the Koa Companies until after state and federal agencies
4 initiated investigations into his campaign activities.¹³ See Nelson Daranciang, *Tanonaka to*
5 *Serve 3 Months in Prison*, STARBULLETIN.COM, Nov. 4, 2005; *Willful Misconduct Caused Legal*
6 *Plunge*, STAR-BULLETIN, Nov. 7, 2005. If the payment from IDB was not *bona fide*
7 compensation and TFC had accurately reported it as a contribution, then the relationship, as well
8 as the prohibited contribution, would have been revealed. Finally, Tanonaka's pattern of
9 willfully concealing the true sources of other loans he made from personal funds to both TFC
10 and his 2002 state campaign raises questions as to whether the payment from IDB is another
11 instance of the same conduct.

12 On the other hand, the Department of Justice ("DOJ") did not obtain a plea from
13 Tanonaka on any FECA violation related to the \$70,000 payment. In addition, the plea
14 agreement states as fact that Tanonaka was not paid according to the terms of the consulting
15 contract simply because Dong was having financial difficulties.

16 Ultimately, whether there was any violation of the Act associated with the \$70,000
17 payment will depend upon whether the consulting agreement between Tanonaka and the Koa

¹² The late August \$70,000 payment to Tanonaka was made after the coverage period for the Financial Disclosure Statement, which ended July 19, 2004. Accordingly, the plea agreement covered only Tanonaka's failure to disclose the earlier \$3,000 payment.

¹³ According to press reports, shortly after entering the consulting contract with the Koa Companies in 2003, Tanonaka contacted Hawaii's Governor on behalf of Koa Timber, Inc. regarding the company's application for permission to harvest koa trees on the island of Hawaii. In an e-mail to the Governor regarding the matter Tanonaka claimed to have no financial interest in the venture. Curtis Lum, *Tanonaka Sentenced to 3 Months in Prison*, HONOLULU ADVERTISER, Nov. 4, 2005; Our Opinion, *Willful Misconduct Caused Legal Plunge*, THE HONOLULU STAR-BULLETIN, Nov. 7, 2005.

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1 Companies was in fact *bona fide*; whether Tanonaka actually performed the work for which he
2 was paid; and whether the pay he received was commensurate with the amount of money that
3 would be paid to any similarly qualified person for the same work over the same period of time.
4 11 C.F.R. § 113.1(g)(6). However, based on the timing of IDB's payment to Tanonaka,
5 Tanonaka's concealment of his relationship with the Koa Companies, and his pattern of hiding
6 the sources of funds used to make loans to his campaigns, the Commission may draw a
7 reasonable inference that the \$70,000 payment to Tanonaka in August 2004 may not have been
8 *bona fide* compensation for consulting work.

9 The information available at this time provides reason to believe that the violations at
10 issue were knowing and willful. 2 U.S.C. §§ 437g(a)(5)(B) and 437g(d). The phrase "knowing
11 and willful" indicates that "actions [were] taken with full knowledge of all of the facts and a
12 recognition that the action is prohibited by law." H.R. Rpt. 94-917 at 3-4 (Mar. 17, 1976)
13 (*reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1976 at
14 803-4 (Aug. 1977)); *see also National Right to Work Comm. v. FEC*, 716 F.2d 1401, 1403 (D.C.
15 Cir. 1983) (*citing AFL-CIO v. FEC*, 628 F.2d 97, 98, 101 (D.C. Cir. 1980) for the proposition
16 that "knowing and willful" means "'defiance' or 'knowing, conscious, and deliberate flaunting'
17 [sic] of the Act"); *United States v. Hopkins*, 916 F.2d 207, 214-15 (5th Cir. 1990). In addition,
18 the *Hopkins* court held that taking steps to disguise the source of funds used in illegal activities
19 may reasonably be explained as a "motivation to evade lawful obligations." *Hopkins*, 916 F.2d
20 at 213-14 (*citing Ingram v. United States*, 360 U.S. 672, 679 (1959)) (internal quotations
21 omitted).

22 Knowing and willful scienter is necessary for criminal liability under the Act. *See*
23 2 U.S.C. § 437g(d); *see also Faucher v. FEC*, 743, F.Supp. 64, 71 (D. Maine 1990) (Attorney

1 General has criminal enforcement role only for knowing and willful violations); *U.S. v. Tonry*,
2 433 F.Supp. 620, 622 (D. Maine 1977) (defendants cannot be convicted of violating the Act
3 unless each charged violation was in fact knowing and willful). Therefore, Tanonaka's
4 admission of criminal guilt in connection with the \$11,000 loan he made to TFC in October 2004
5 is conclusive proof that that violation was knowing and willful.

6 As described above, the August 2004 IDB payment to Tanonaka likely represents either
7 compensation for *bona fide* services provided, in which case there would be no violation at all, or
8 a deliberate scheme to conceal as sham "compensation" the source and amount of a prohibited
9 corporate contribution. Knowing and willful intent may be inferred from "an elaborate scheme
10 [to] disguise." *Hopkins*, 916 F.2d at 213-14. In the interest of putting respondents on notice as
11 to their potential liability, the Commission had found reason to believe that the potential
12 violations were knowing and willful.

13 Therefore, Dalton Tanonaka knowingly and willfully violated 2 U.S.C. §§ 441a(f) and
14 441b(a) by accepting excessive and corporate contributions, and Tanonaka for Congress and
15 Dalton Tanonaka, in his official capacity as treasurer, knowingly and willfully violated 2 U.S.C.
16 §§ 441a(f), 441b(a) and 434(b) by accepting these excessive and corporate contributions and
17 falsely reporting their sources.